FILED
OCT 14 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-184

In Re
WILLIAM WHITLEY HODGES,
Petitioner.

REPLY AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

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QUESTIONS PRESENTED

I.

Should this Court issue a Writ of Certiorari where the Petitioner has failed to demonstrate the existence of a substantial federal question?

II.

Should this Court consider a Petition for Writ of Certiorari where the requirements of Supreme Court Rule 17 have not been met?

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OPINIONS BELOW

The opinion below appears at 303 S.E.2d 89, ___ S.C. ___ (1983), captioned as In The Matter Of William Whitley Hodges, Respondent. A copy of that opinion is appended to Petitioner's Petition at 1(a) and is incorporated herein by reference.

The recommendationsof the Executive Committee of the Board of Commissioners on Grievances and Discipline and the Hearing Panel of the Board of Commissioners on Grievances and Discipline are unreported. These opinions are appended to Petitioner's Petition at 8(a) and 14(a), respectively, and are incorporated herein by reference.

JURISDICTION

This Honorable Court is without jurisdiction to consider this Petition. Petitioner has attempted to invoke jurisdiction pursuant to 28 U.S.C. 1257 (3). However, a review of the Petition reveals that the requirement of 28 U.S.C. 1257 (3) that a substantial federal be present has not been met. Question 1 at i of Petitioner's Petition is an

attempt by the Petitioner to invoke this Court's jurisdiction to review a factual determination made by the South Carolina Supreme Court as to that Court's application of its Disciplinary Rule 2-101 of the Code of Professional Responsibility. This Court has held that when such a decision has been based on independent and adequate State grounds, review under 28 U.S.C. Section 1257(3) will be denied. Henry v. State of Mississippi, 379 U.S. 443 (1965), rehearing denied, 380 U.S. 926, on remand 174 So.2d 348, motion denied, 381 U.S. 908; Dixon v. Duffy, 342 U.S. 33 (1951); Young v. Ragen, 337 U.S. 235 (1949); Henry v. Williams, 299 F.Supp. 36 (1969).

As to Petitioner's question No. 2

at i of Petitioner's Petition, Petitioner misconstrues the opinion of the South Carolina Supreme Court to include the misleading in practice grounds for the violation of the Code of Professional Responsibility, Section 2-101. See State Court Opinion at 8(a) of Petitioner's Petition. There can be no substantial federal question raised by an issue that was not addressed in the State Court opinion.

PROVISIONS OF STATE LAW INVOLVED

The Disciplinary Rule 2-101(A) of the Code of Professional Responsibility of South Carolina is set forth on pages 2 and 3 of Petitioner's Petition and incorporated herein by reference.

STATEMENT OF THE CASE

Petitioner is an attorney practicing law in Columbia, South Carolina. He was admitted to practice law in 1973 and since that time had engaged in a general practice until 1980 when bankruptcy began to dominate his practice. In the early summer of 1981, the Petitioner placed an ad in several newspapers of general circulation in Columbia, South Carolina, area providing the following:

Our GET OUT OF DEBT Service

IF YOU ARE BEING HARASSED BY YOUR CREDITORS AND YOU NEED HELP TO GET OUT OF DEBT:

°STOP CREDITOR'S HARASSING CALLS

°STOP FORECLOSURE OF HOME OR PROPERTY

°STOP INTEREST/FINANCE CHARGES FROM BUILDING UP

IF YOU ARE EMPLOYED AND NEED HELP
TO GET OUT OF DEBT, OUR LAW FIRM
CAN HELP YOU BY ENROLLING YOU IN
A WAGE-EARNERS PLAN. CALL
WILLIAM HODGES FOR AN EVALUATION
OF YOUR PROBLEM AND AN APPOINT-
MENT.
799-9985 weekdays 787-4828 weekends

THE WILLIAM HODGES LAW FIRM
1338 MAIN AT WASHINGTON
Save this ad for future reference

In December 1981, the Board of Commissioners on Grievances and Discipline, South Carolina Bar, served a Complaint upon the Petitioner stating that the above-referenced ad was an advertisement that was false, misleading, and self-laudatory. It was later stipulated by the Complainant that the Petitioner was charged with violating the following provisions: Disciplinary Rules 1-102(A)(4,5, and 6), 2-101(A)(1)(a,b,c, and f), 2-101(A)(2)(d and f) and Section 5(B and D), of the Rule on

Disciplinary Procedure.[1]

In September 1982, the hearing on the merits was held. Complainant in accordance with its position that the ad was misleading on its face offered the ad itself into evidence and offered no witnesses. However, the Complainant did agree along with the Petitioner for the Standing Chapter 13 Trustee for the District of South Carolina to be called as an expert by the Hearing Panel to provide the Panel with background expertise as to Chapter 13 Bankruptcy Law. It was the Complainant's position that the ads spoke in absolute terms and guaranteed results without any caveats

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1. See pages 2,3,5, and 7 of Petitioner's Petition for a citation of these provisions, which are incorporated herein by reference.

or disclaimers and that based upon applicable law that the Hearing Panel could make the determination as to the ad being misleading without the taking of testimony.

Following the hearing the Panel issued its report that concluded that Petitioner's ad was misleading in practice, that the ad was inherently false and misleading, that the ad was not entitled to First Amendment protection and may be prohibited, and that the ad contravenes the Disciplinary Rules promulgated by the South Carolina Supreme Court.[2] The Hearing Panel

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2. Reference is made to pages 53a-54a of Petitioner's Petition as to a citation to the Panel Report, which is incorporated herein by reference. Also reference is made to footnote 8, pg. 19, of Petitioner's Petition as to the

based its decision after a review of Chapter 13 Bankruptcy Law[3], and concluded that "[t]he advertisment implies guaranteed and automatic results without exception or explanation," and further it was pointed out by the Panel that it was admitted by Petitioner's own expert witness that the ad was only "fairly accurate", "substantially accurate", and "probably accurate".[4] The Panel also found that the inquiry

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2.cont.
provisions of the Code of Professional Responsibility referred to by the Hearing Panel, which is incorporated herein by reference.

3. Reference is made to 33a-42a of the Petitioner's Petition which cites the Panel Report in pertinent part, which is incorporated herein by reference.

4. Reference is made to 40a-41a of the Petitioner's Petition which cites the Panel Report, which is incorporated herein by reference.

clause in the ad was not a disclaimer nor did it obviate the necessity of a disclaimer.[5]

The Hearing Panel recommended a public reprimand.[6] The Executive Committee adopted the Panel's finding of fact and conclusions of law, but by the vote of three to two, voted to modify the sanction of the Panel to a private reprimand. Two members of the Executive Committee voted

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5. Reference is made to 41a-42a of the Petitioner's Petition which cites the Panel Report, which is incorporated herein by reference.

6. Reference is made to 60a of the Petitioner's Petition which cites the Panel Report, which is incorporated herein by reference.

for no sanction to be imposed.[7]

The Supreme Court of South Carolina in a per curiam opinion citing a recent advertising decision, In the Matter of Harvey William Burgess, 302 S.E.2d 325 (S.C. 1983), found that the advertisement in question was misleading and violated DR 2-101. Two of the five Justices dissented and would have dismissed the Complaint.

ARGUMENT

I.

Lack of Substantial Federal Question

As the Statement of the Case and the documents appended to Petitioner's

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7. Reference is made to 13a of the Petitioner's Petition which cites the Board's Report, which is incorporated herein by reference.

Petition and incorporated herein by reference indicate, the issues presented on this appeal involve an attorney publishing an advertisment as to relief under Chapter 13 Bankruptcy without disclosing that the relief to be granted was pursuant to bankruptcy law, and without disclosing that the relief was not absolute. Further the ad was published without including disclaimers or warnings. The State Supreme Court simply citing the recent decision In the Matter of Burgess, supra, which cited this Court's decision In the Matter of R.M.J., 455 U.S. 191 (1982), stated that the ad was misleading and violated DR 2-101. Upon the application of Section 2-101, and by reference to the Burgess decision, the Court made a factual determination that the ad (1) contained a

misleading statement, (2) omits a material fact necessary to make a statement not misleading, (3) is intended to attract clients by use of showmanship or garnish format and (4) is presented in an undignified manner.[8] It should be noted that the Petitioner even in his Questions Presented to the Court presented a factual issue as to whether the ad was misleading.[9]

Admittedly, this is a very serious matter, but in order for this Court to grant review it must find a substantial federal question as defined within the plain language of 28 U.S.C. 1257, that

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8. Note this conclusion comes from the reference in the Hodges opinion, 2a of Petitioner's Petition, to the Burgess opinion, 302 S.E.2d at 326.

9. It should be further noted that the misleading in practice issue addressed by the Petitioner in its Question 2 was never discussed by the Court in its decision and therefore presumed not adopted from the Panel Report.

is, the case must involve a right or immunity created by the Constitution or laws of the United States. Pan Am. Petroleum Corp. v. Superior Court of Delaware In and For New Castle County, 366 U.S. 656 (1961).

Petitioner has attempted to bootstrap himself into jurisdiction by presenting constitutional issues when the truth of the matter is that the State Supreme Court was applying its standards as set forth in its Code of Professional Responsibility (provisions which it might be added were not constitutional challenged by the Petitioner) to the ad in question. This attempt to invoke the jurisdiction of this Court by attaching constitutional labels to matters of factual determination must be denied as being without a sub-

stantial federal question. Seaboard Air Line Ry. Co. v. Watson, 287 U.S. 86 (1932).

II.

Failure to Comply With Supreme Court Rule 17.

Petitioner has failed to comply with Supreme Court Rule 17 and this is apparently admitted by Petitioner in his lack of reference to this Rule in his Petition. The State Court has not decided a federal question in a way which conflicts with another State Court of last resort or a Federal Court of Appeal nor has this State Court decided a federal question in a way which conflicts with the applicable decision of this Court. Further, the decision below turns upon its own merits and would affect few others than the litigant, and finally, for the reasons previously stated

the lower court's decision is correct. Therefore pursuant to Rule 17, this Court should exercise its discretion and deny Petitioner's request.

CONCLUSION

For the above-stated reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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